IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 296.

THE GOODYEAR TIRE & RUBBER COMPANY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER, THE GOODYEAR TIRE & RUBBER COMPANY.

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This brief is submitted by Petitioner, The Goodyear Tire & Rubber Company (hereinafter "Goodyear"), in reply to the brief submitted on behalf of the Federal Trade Commission in Nos. 292 and 296 (hereinafter cited as "Comm. B.").

The bulk of the Commission's brief is devoted to justification of the order against The Atlantic Refining Company (hereinafter "Atlantic") deriving from the alleged relationship between Atlantic and its dealers. This reply brief does not deal with that question and instead concentrates upon that portion of the order which is addressed to Goodyear and which prohibits Goodyear from any sales commission plan not only with Atlantic but with any other marketing oil company, whatsoever.

I.

Goodyear is not a transgressor.

In an attempt to rationalize the broad-scale order against Goodyear, the Commission's brief insinuates that the sales commission contract with Atlantic was somehow itself improper (Comm. B., pp. 58, 59, 69, 70) and elsewhere points to Goodyear as a deliberate transgressor of the Act who must expect a dragnet order (Comm. B., p. 74).

In so doing, the Commission's brief ignores fundamental facts.

Three basic, uncontradicted conclusions as to Goodyear were made by the Hearing Examiner:

1. The complaint did not charge nor did the evidence prove the existence of a conspiracy between Goodyear and Atlantic to restrict and restrain competition in TBA products (G. R. 110).*

2. There was no evidence that Goodyear engaged in or participated in any acts designed to force dealers of Atlantic to purchase TBA products (*ibid.*).

3. No clause or provision of the sales commission contract between Atlantic and Goodyear required Atlantic's dealers to purchase only Goodyear TBA (G. R. 110-11).

Not a single finding by the Commission contradicted or altered these conclusions of the Hearing Examiner. Rather, the Commission found that Atlantic had a special kind of power with respect to its dealers which rendered the totality of its arrangements improper. The Commis-

* Reference is thus made throughout to the Goodyear record.

sion did not find anything illegal about the sales commission contract itself.* The illegality found by the Commission stemmed from its postulate of "power" in Atlantic; it reached a different result from the Hearing Examiner on this ground alone (G. R. 121).

We have heretofore argued that in light of these uncontradicted findings the Commission's order against Goodyear is manifestly unjust. We submit that the Commission's brief does not answer this point by ignoring the fact that the findings were made and still stand.

II.

Even if abolition of the Goodyear-Atlantic sales commission plan were proper, prohibition of all Goodyear plans with all oil companies is unwarranted.

> *"If, as Goodyear suggests, there are individual oil companies who either do not have the same power over their dealers or would not similarly exercise it in carrying out their plans, Goodyear may always seek from the Commission an exception to the order for the particular case."* (Comm. B., p. 83)

The Commission's brief thus flatly concedes that any Goodyear sales commission plan with any oil company is lawful unless the oil company participant *both* has "power" over its dealers to compel the purchase of Goodyear TBA *and* will exercise such power.

The Commission's brief acknowledges this double test and attempts to meet it by setting out two headings:

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* Indeed, neither the Hearing Examiner nor the Commission found that Goodyear even had knowledge of any of the alleged coercive acts of Atlantic.

"(1) The record shows that other oil companies have the same kind of power over their dealers as Atlantic" (Comm. B., p. 75),

and

"(2) In performing their sales commission agreements with Goodyear, other oil companies used the same kind of pressure techniques that Atlantic did" (Comm. B., p. 76).

It is submitted that (1) the Commission made no findings that these criteria were met; (2) these findings cannot legally be supplied by the Commission's attorneys; and (3) in any case, the evidence either contradicts or does not support the conclusions which the Commission's attorneys seek to substitute for missing Commission findings.

A. The failure to make findings.

The Commission's brief candidly acknowledges that it is attempting to fill the void left by the Commission's failure to make the crucial findings by interposing its own arguments as to what the Commission might have found on the record below had it made findings.* But neither the candor of the Commission's attorneys nor anything they now say can cure that failure. As this Court observed

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* "While the Commission's opinion did not articulate the reasons for the scope of the order, we submit that the record provided the Commission with a sufficient basis to conclude (1) that the other oil companies with whom Goodyear had sales commission agreements had the same kind of economic power over their dealers as Atlantic; and (2) that in performing such agreements those companies did and were likely to do the same things that Atlantic had done in performing its contract, with the same adverse effect upon competition." (Comm. B., pp. 74-75)

This concession of the lack of findings was of course necessary in light of the Commission's failure in its opinion to make any

in *Atchison, T. & S.F. Ry. Co.* v. *United States,* 295 U. S. 193, 201-02:

> "This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida* v. *United States,* 282 U. S. 194, 215."

In *Florida* v. *United States,* 282 U. S. 194, 215, the Court had said, reversing an order by the Interstate Commerce Commission:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently adverted (*The Beaumont, Sour Lake & Western Railway Company* v. *United States, ante,* p. 74), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

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finding at all as to the "power" of other oil companies over their dealers or the exercise of such power. The opinion did say that "evidence of record in this case shows that oil companies other than Atlantic have employed coercive tactics in requiring their dealers to purchase Goodyear TBA" (G. R. 162), but the only other oil company named by the Commission was Sinclair.

See also *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80, 87-88, 92.

The wisdom of refusing to substitute attorneys' arguments for the missing findings of an agency is strikingly illustrated here. The Commission's brief cites at several points the testimony of one Edwards, described as a "former Shell salesman" (see Comm. B., pp. 79, 80, 81, 82). Yet the Hearing Examiner, who made detailed findings about the testimony of former Atlantic dealers (G. R. 104-08) and also mentioned the testimony of competing TBA suppliers (G. R. 108), did not refer to Edwards' testimony; neither did the Commission refer to Edwards' testimony, although it did see fit to quote from the testimony of a number of witnesses, including two former Sinclair-Sherwood dealers. An explanation for the decision of the trier of fact to ignore Edwards may well lie in the conclusion that his testimony was not probative. Cross examination of Edwards had brought out material inconsistencies between his testimony in this case and his prior testimony in other matters.* Where the trier of fact has chosen not to resolve an issue posed as to the probity of a witness, the questioned testimony can hardly be dredged from the record

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* Under cross examination, Edwards was confronted with inconsistencies between his testimony in this case and his prior sworn testimony given in another Commission proceeding (*Shell Oil Company*, Docket 6487) and before a Congressional committee investigating TBA practices. He responded, *inter alia*: "I have testified that way but it wasn't that way" (G. R. 1404); "I stated that and it was wrong" (G. R. 1344); and "That was testimony as of yesterday" (G. R. 1408) (his testimony "yesterday" had been before the same Hearing Examiner and dealt with the same subject matter but was given in the *Shell* proceeding). For examples of further inconsistencies admitted by Edwards, contrast G. R. 1343 with G. R. 1309, 1344, 1424; G. R. 1344 with G. R. 1327, 1429-30; G. R. 1411 with G. R. 1366-69. At the close of Edwards' redirect examination, the Examiner had observed: "I think you are just confusing us a little more, Mr. Kelaher [Commission counsel]. The witness has already stated that that was an error. * * *. An explanation probably won't help any" (G. R. 1429-30).

by counsel at some later date to serve as a ground for an otherwise unexplained result.

Given the concession in the Commission's brief concerning the Commission's failure to make findings about oil companies other than Atlantic, it is submitted that no proper basis exists for the prohibition of Goodyear's sales commission plans with other oil companies.

B. In any event the record is wholly insufficient as to other oil companies.

Even if an agency's attorneys were free to search a record for evidence to fill the gaps left by an agency's failure to make necessary findings, the Commission's brief is both insufficient and inaccurate.

1. *The existence of "power".* For example, the brief concludes that "other oil companies have the same kind of power over their dealers as Atlantic" (Comm. B., p. 75). Only *two* other oil companies are mentioned under this heading—Shell and Sinclair—and the reference to those two is limited to purported details of their arrangements with certain of their respective dealers. To this is added only the statement of an Atlantic executive, made in a different context, that "practically all the branded companies operate principally with lessee dealers."*

* If oil company power depends upon control of lessee dealers, the record herein is at best ill-suited to determining its existence. For example, the only evidence at all as to Shamrock is that, as of November 1951, it had but eight lessee dealers and approximately 300 stations buying from jobbers (G. R. 2509). In the case of Goodyear's sales commission agreement with Ashland, that contract applies only to TBA sales to Ashland's franchised jobbers and not to lessee dealers (G. R. 2598). Furthermore, there is nothing anywhere in the record that shows how many lessee dealers any other oil company had, except for data showing that Shell had, as of July 1, 1956, 4,028 lessee dealers and 7,068 other dealers and jobbers (G. R. 3393-96, 1447).

The difficulties in using the record as the Commission's brief now would be manifest:

—At most, the brief attempts to prove only that Shell and Sinclair had the same "power" over their dealers as Atlantic. The brief does not even claim, let alone prove, that Anderson-Prichard, Ashland, Carter, D-X Sunray, Frontier, Quaker State, Richfield and Shamrock (the other companies which the record shows as having sales commission plans with Goodyear, see Goodyear's main brief, p. 6n) also had such power. Further, the Commission's brief makes no attempt at all to explain how the Commission could conclude that every marketing oil company in the country (of which there are at least 156 as Goodyear's main brief pointed out at p. 47n) has and exercises the requisite power over its dealers. But then, the Commission offered no rationale either and, indeed, never stated such a conclusion. It simply entered an order outlawing any plan with all marketing oil companies.

—Particularly, it is outlandish for the Commission's brief to be arguing to this Court that the record in the *Goodyear-Atlantic* case permits the Commission to outlaw the Goodyear-Shell sales commission plan because it demonstrates Shell's power *vis-a-vis* its dealers (even though the Commission made no finding to that effect) when the very question of Shell's power over its dealers (and whether such power was exercised) was and is at issue in a Commission proceeding against Shell, review of which is now *sub judice* before the United States Court of Appeals for the Fifth Circuit, *Shell Oil Co.*, 58 F. T. C. 371 (1961), *appeal docketed*, No. 18,967, 5th Cir. 1963.

—It is even more outlandish for the Commission's brief to imply—though it does not dare to claim expressly—that

the testimony cited as to Shell and Sinclair establishes that Texaco (with which Goodyear presently has a sales commission plan) has the postulated "power" over its dealers after the Court of Appeals for the District of Columbia Circuit has ruled that there is "no basis in the record for the Commission's conclusion that Texaco has controlling economic power over its dealers". *Texaco, Inc.* v. *Federal Trade Commission*, 336 F. 2d 754, 762 (D. C. Cir. 1964), *petition for cert. filed*, October 1964 (No. 635).

2. *The exercise of "power".* The Commission's brief is also unsuccessful in canvassing the record for proof that "other oil companies used the same kind of pressure techniques that Atlantic did" (Comm. B., p. 76).*

The strongest assertion which the Commission's brief is willing to make about the state of the record on exercise of control by other oil companies is that "the record contains affirmative evidence that several companies pursued some of the very activities upon which the Commission rested its finding that the Atlantic-Goodyear arrangements violated Section 5" (Comm. B., p. 77).

Use of the phrase "several companies" is in this case an overstatement, even taking the "affirmative evidence" on the terms stated. The discussion (Comm. B., pp. 78-79) of Carter's decision to switch from purchase-resale distribution of B. F. Goodrich products (Miller brand) to a

*As to Atlantic itself, coercive acts have been enjoined by that portion of the Commission's order which Atlantic has not appealed to this Court. There is no finding by the Commission that Atlantic has a proclivity for violating the law or for other reasons could not be trusted to obey this injunction. Accordingly, of the two elements conceded by the Commission's brief to be necessary to illegality, one—the likelihood of actual exercise by an oil company of power over its dealers (Comm. B. pp. 74-75, 83)—is no longer applicable to Atlantic. There is, therefore, no basis to prohibit Goodyear from a sales commission contract with Atlantic, let alone with over 150 other oil companies.

Goodyear sales commission plan appears intended only to add the name of another company. No coercive conduct of any kind by Carter is pointed to, and most of the record references cited are found in a 12-page edition of the Carter dealers' newspaper, the whole issue of which was devoted to announcing the new TBA arrangements.

Aside from Carter, and setting aside the footnoted reference to territorial division (Comm. B., p. 82 fn. 45) which is simply inaccurate,* the only "other oil companies" referred to are Shell and Sinclair-Sherwood.

The brief's references to Shell have the continuing infirmities that (1) the Commission does not mention any coercion by Shell in its opinion, (2) the issue of Shell's exercise of power over its dealers was litigated before the Commission and is now *sub judice* before the Court of Appeals for the Fifth Circuit, and (3) the testimony principally cited is that of Edwards.

As to Sinclair, all references are really to Sherwood—a wholly-owned subsidiary merged into Sinclair in 1955 before the complaint was filed. The TBA sales commission plan with Sherwood was terminated when the merger took place (CX 68C, G. R. 2550). Since then Goodyear and Sinclair have continued a sales commission agreement made in 1944 which differs radically from the plan at issue since

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* All Goodyear sales commission plans are non-exclusive. The decision to divide Atlantic's sales area into a Goodyear territory and a Firestone territory was made by Atlantic alone for its own reasons (G. R. 2361-62). Moreover, the Hearing Examiner ruled (and was not contradicted by the Commission): "After reviewing the record, the hearing examiner is of the opinion that no connection has been established between Goodyear and The Firestone Tire & Rubber Company contracts with The Atlantic Refining Company * * *" (G. R. 91). In other instances in which Goodyear and one or more other rubber companies have sales commission plans with the same oil company, there has been no division of territories.

it is limited to automotive accessories and excludes tires and batteries.

Apart from this hodge-podge of citations to largely unevaluated testimony and papers, the Commission's brief seeks to urge, from the fact that Goodyear's sales commission agreements with oil companies have substantially the same terms, that anything done by Atlantic to compel its dealers to purchase Goodyear TBA has necessarily been done by other oil companies which had sales commission arrangements with Goodyear:

> "In short, these contracts, like the Atlantic contract, require the other oil companies to bring to bear their full power over their dealers to require the latter to purchase Goodyear TBA. There is no reason to suppose that the other oil companies are any less vigorous than Atlantic in promoting sponsored TBA, or that the anticompetitive effects of their activities are any less significant." (Comm. B., p. 77)

The first of the quoted sentences is simply untrue, for there is nothing in any Goodyear sales commission agreement which can be construed as requiring the oil company participant to bring to bear its full power over its dealers to require the latter to purchase Goodyear TBA.* The second of the quoted sentences is incredible and inaccu-

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* Indeed, the Commission's brief fails to bring to the attention of the Court the following express provision of the sales commission agreement between Goodyear and Atlantic:

> "* * * [A]s has been the practice in the test area, our resale outlets shall be free to choose whether, and to what extent, they shall avail themselves of the opportunity to purchase Goodyear products and services and * * * any resale outlet which chooses to carry products other than Goodyear shall not be prejudiced in any manner. Of course, we both understand that our organization cannot and will not use any methods other than salesmanship to encourage our resale outlets to purchase your products and services." (CX 16, G. R. 2406-07)

rate.* In the absence of a Commission finding, the Commission's attorneys now depart from the record and make a high-flown supposition—the effect of which is to devise a shifting burden of proof under which, at least when oil companies are involved, a reviewing Court is to presume that whatever is true of one oil company is true of all in the absence of a contrary showing.**

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* Thus, the *amicus* Champlin points out that it can hardly be said to be exercising "power" over its dealers when 70 percent of their TBA purchases are of non-sponsored brands (*Amicus Curiae Brief of Champlin Petroleum Company*, submitted in No. 292 on behalf of nine small oil companies, pp. 10-11). There is currently at issue before the Court of Appeals for the Fifth Circuit the question whether more than 35 percent of the TBA sold by Shell dealers is sponsored TBA. In short, law and fact do not permit the overpowering, conclusive presumption that all oil companies uniformly and consistently treat their dealers in an unlawful fashion.

** Presumptions and suppositions about the nature of power in the oil industry do not now satisfy the Commission. Indeed, in its recent *Statement of the Federal Trade Commission Announcing Broad Inquiry Into Problems of Competition in the Marketing of Gasoline* (December 30, 1964), reprinted at Annex A-7-9 of Goodyear's main brief *but not even mentioned in the Commission's brief*, the Commission said:

> "The Commission has received a large number of inquiries, complaints, and petitions from various groups in the gasoline industry, from members of Congress, and from members of the consuming public, with respect to competitive problems in the marketing of gasoline. It is evident both from these submissions and from the Commission's experience in this industry in enforcing the laws which it administers that a broad, comprehensive, and industry-wide approach to the competitive problems of the industry is necessary and that specific remedial measures required in the public interest should not be attempted before obtaining a solid factual foundation in regard to the competitive conditions of gasoline distribution. As the Supreme Court stated in a recent decision, proper and effective remedial action in this industry requires that the Commission make realistic appraisals of relevant competitive facts, and these facts are highly complex. The Commission has accordingly determined forthwith to institute an industry-wide inquiry into the competitive problems of marketing gasoline. The Commission intends to employ its flexible administrative powers of investigation and fact-finding as may be found necessary to assure a complete, fair, and realistic understanding of the structure and dynamics of competition in the industry."

This suggestion (like the one that Goodyear may always seek to have a particular oil company classified as an exception to the order) is sought to be justified on the pretense that there is at issue really nothing but a question of remedy. Hence the brief's reference to cases where Commission orders were challenged not on the ground (as here) that no violation should have been found but on the theory that, admitting violation, the scope of the orders was too broad (Comm. B., pp. 83-84).

In *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419, *International Salt Co.* v. *United States*, 332 U. S. 392, and *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, the concern was only with reach of the order once unlawfulness had been determined. The issue here is not merely scope of the order, but the basic lawfulness of Goodyear's sales commission arrangements—both actual and potential. It is submitted that the absence of Commission findings or evidence of record that all oil companies both have the requisite power over their dealers and will exercise it amounts to an utter failure of proof requiring reversal.

III.

The Commission's failure—now expressly conceded—to consider alternative forms of relief requires reversal and remand in any event.

Without reference to the issues discussed *supra*, this case must be reversed and remanded. Taken on its own ground of the appropriateness of the remedy, the Commission's brief expressly concedes that "*[T]he Commission's opinion did not articulate the reasons for the scope of the order*" (Comm. B., p. 74); this concession alone requires

that the matter be remanded for the Commission to consider the appropriateness of alternative forms of relief and to state its reasons for selecting the relief it chooses.

This Court has expressly held that an agency must "articulate" its choice of remedy. In *Burlington Truck Lines* v. *United States*, 371 U. S. 156, the case was remanded because of the agency's failure in choosing a remedy to "articulate any rational connection between the facts found and the choice made" (371 U. S. at 168). See also *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 613-14; and *Gilbertville Trucking Co.* v. *United States*, 371 U. S. 115, 130-31.

These cases make clear that, without express consideration of alternatives, an agency fails to provide reviewing courts with a basis for adequate review.

In this instance, the point does not rest on mere technical defects. Goodyear's initial brief suggested, by way of example, five major areas of possible relief which the Commission should have considered, on its own theory of the case, before fixing upon the instant broadside order (pp. 57-59).

The Commission's brief reflects the need for the open and rational consideration which the instant order lacks.

The brief adverts to one of the possibilities mentioned by Goodyear (modification of an element of an oil company-dealer relationship) and opines that "Goodyear itself would no longer desire the sales commission arrangement" if such modification were effected (Comm. B., p. 72).

Another comment in the Commission's brief is of like character. Champlin Petroleum Company submitted in No. 292 an *amicus* brief on behalf of nine small marketing companies which requests that its sales commission plans with Goodyear and Firestone be preserved; Champlin

stated therein that over 70% of the TBA sold through its outlets was non-sponsored TBA "even after years of promotional effort in sponsored TBA" (pp. 10-11). In response, the Commission's brief states an inability to understand why an oil company would want an unsuccessful sales commission plan to continue (Comm. B., p. 68 n. 39).

We submit that it is not up to the Commission's attorneys to decide what is good for Goodyear, Champlin or any other oil or rubber company. It is the Commission's expertise, not attorneys' improvisations, to which the parties hereto were entitled. Through the study required by the careful and explicit weighing of remedy, the Commission might ultimately have come to realize that a sales commission plan does not depend on coercion or inordinate "power" and is not deemed unsuccessful if an oil company's dealers choose to sell more non-sponsored than sponsored TBA.

Goodyear's main brief demonstrated in Point III that the Commission had failed to perform its required duties in fixing a remedy (pp. 54-60). It is submitted that the Commission's brief has confessed error in openly admitting that the Commission failed to articulate the reasons for the scope of the order.

Conclusion.

This Court should reverse and remand for dismissal of the complaint.

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